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No. 81-33

In the Supreme Court of the United States

OCTOBER TERM, 1980

DAVID M. WOLLMAN, PETITIONER

v.

JAKE GROSS, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT S. GREENSPAN
CARLENE V. MCINTYRE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner's tort claim arising out of an automobile accident accrued under the Federal Tort Claims Act at the time of his injury, when he knew that the other driver was an employee of the Agricultural Stabilization and Conservation Service, or later, when he discovered that the other driver was acting within the scope of his federal employment at the time of the accident.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-44) is reported at 637 F. 2d 544. The order of the court of appeals denying a petition for rehearing (Pet. App. 72-81) is reported at 646 F. 2d 1306. The decision of the district court (Pet. App. 45-67) is reported at 484 F. Supp. 598.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1980, and a petition for rehearing was denied on April 9, 1981. The petition for a writ of certiorari was filed on July 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

STATEMENT

This case arises out of an accident that occurred at 4:00 p.m. on Friday, June 11, 1976, when an automobile driven

by respondent Jake Gross, Jr., a district director of the Agricultural Stabilization and Conservation Service, struck an automobile driven by petitioner David M. Wollman (Pet. App. 3). At the time of the accident, respondent was returning to his home duty station from the ASCS office in Mitchell, S.D., one of ten county offices that he supervised. Respondent failed to notify his administrative officer of the accident, and petitioner commenced negotiations with respondent's personal insurer (*id.* at 3-4). Petitioner knew at the time of the accident that respondent was employed by the ASCS. Neither he nor respondent was aware, however, that under applicable legal principles respondent was acting within the scope of his employment as a federal employee when the accident occurred and that petitioner's sole legal remedy was against the United States (Pet. App. 47, 65-66).

On January 25, 1979, more than two years after the accident, petitioner brought suit against respondent in state court (Pet. App. 4). In February 1979, counsel for respondent's personal insurer realized the possible significance of respondent's federal employment and filed an amended answer asserting that fact (*id.* at 4, 8). Thereafter, on March 23, 1979, the United States Attorney, acting pursuant to the Federal Drivers Act, 28 U.S.C. 2679(b)-(e), appeared and removed the case to the United States District Court for the District of South Dakota.[1] He then moved to dismiss the suit on the ground that petitioner's exclusive remedy was a

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[1]The Federal Drivers Act provides (28 U.S.C. 2679(b)) that a suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), is the exclusive remedy for damages "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment * * *." The Drivers Act also provides (28 U.S.C. 2679(d)) that suits instituted against federal employees in state court are to be removed by the Attorney General to federal district court after certification that the defendant was a federal employee acting within the scope of his employment at the time of the accident.

suit against the United States under the Federal Tort Claims Act and that petitioner had failed to file an administrative claim within the period established by the Act's limitations provision, 28 U.S.C. 2401(b). Petitioner filed an administrative claim with the Department of Agriculture on July 16, 1979, and shortly thereafter moved to remand the case to state court (Pet. App. 4).

The district court granted the government's motion to dismiss and denied petitioner's motion to remand. It found that respondent was a federal employee acting within the scope of his employment at the time of the accident and that petitioner's claim was time-barred under 28 U.S.C. 2401(b), which requires that the administrative claim be filed with the appropriate federal agency "within two years after such claim accrues" (Pet. App. 49-67).

The court of appeals affirmed, rejecting petitioner's argument that under the doctrine of "blameless ignorance" his tort claim against the United States did not accrue until February 1979, when respondent filed his amended answer in the state court raising the issue of his federal employment. The court observed (Pet. App. 14) that petitioner "was aware at the time of the accident that Gross was employed by the ASCS" and that "[h]e was unaware only of the legal significance of this fact." The court concluded (*ibid.*) that even if the "blameless ignorance" doctrine applied, petitioner should not prevail, because under *United States* v. *Kubrick*, 444 U.S. 111 (1979), the accrual period could not be postponed until a plaintiff recognized the "legal ramifications" of the facts.

The court of appeals also found no basis in the record or in petitioner's allegations for concluding that either respondent or the United States had engaged in actions designed to "lull [petitioner] into a false sense of security" (Pet. App. 18). Since the state court suit was filed more than two years after the accident, no delay on the part of the United States to

remove the case and have it dismissed could possibly have affected petitioner's rights (*id.* at 16-18).

An equally divided court denied petitioner's petition for rehearing en banc (Pet. App. 72-81).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with decisions of this Court or of other courts of appeals. Accordingly, further review of this unusual fact situation is not warranted.

1. Petitioner contends (Pet. 17-18, 21-22) that the decision below is inconsistent with *United States* v. *Kubrick, supra*. In fact, *Kubrick* squarely supports that decision.

As a general rule, a claim under the Federal Tort Claims Act "accrues at the time of the plaintiff's injury." *United States* v. *Kubrick, supra*, 444 U.S. at 120. A number of courts have held, however, that in medical malpractice cases, where the injury may not manifest itself until long after it has been inflicted, the claim may be deemed to accrue only later, when the victim discovers both the injury and its cause. *Id.* at 120-121 & n.7. Even assuming that this "discovery" rule applies in cases turning on the employment status of the federal tortfeasor[2], petitioner's claim was properly dismissed as time-barred.

In *Kubrick*, this Court rejected the notion that the accrual of a claim under the Federal Tort Claims Act may be postponed until the victim knows not only the facts of his injury and its cause but also their legal significance. In

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[2]Courts have not, however, extended the discovery rule to cases in which the plaintiff is unaware only of the employment status of the federal employee defendant. See, *e.g.*, *West* v. *United States*, 592 F. 2d 487 (8th Cir. 1979); *Baker* v. *United States*, 341 F. Supp. 494 (D. Md. 1972); *Lien* v. *Beehner*, 453 F. Supp. 604 (N.D.N.Y. 1978); *Dunaville* v. *Carnago*, 485 F. Supp. 545, 548 (S.D. Ohio 1980).

accordance with *Kubrick*, the court of appeals correctly held that petitioner's claim was time-barred, concluding (Pet. App. 17 n.6) that it is not "unreasonable to expect [petitioner], who was aware that [respondent] was an ASCS employee, to so inform his counsel, or for counsel to then research the status of ASCS employees for consideration of an FTCA claim."[3] As the Court observed in *Kubrick* (444 U.S. at 124), the two-year limitations period is designed for such inquiries into the "legal implications" of known facts.[4]

2. Contrary to petitioner's contention (Pet. 14-17), the decision below does not conflict with *Kelley* v. *United States*, 568 F. 2d 259 (2d Cir.), cert. denied, 439 U.S. 830 (1978). In *Kelley*, the plaintiffs had filed their state court suit *within* the two-year period for filing claims under the Federal Tort Claims Act. The district court denied the government's motion to dismiss the complaint on the

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[3]Because there would have been no obstacle to a timely invocation of the federal remedy had the employment status question been promptly explored, petitioner's reliance (Pet. 21) on *United States* v. *LePatourel*, 593 F. 2d 827 (8th Cir. 1979), is misplaced, even assuming that *LePatourel* survives *Kubrick* and that resolution of an intra-circuit conflict is a proper use of the writ of certiorari. In *LePatourel*, a suit against a federal judge who was driving on official business when he struck the claimants' car, the limitations period was deemed not to commence until the court had decided a "novel question of federal law"—whether federal judges are federal employees for purposes of the Federal Tort Claims Act. There was no such novel legal question in the present case.

[4]There is no merit to petitioner's contention (Pet. 18-19), which echoes Judge Adams' dissent (Pet. App. 27-29), that he was unaware of a "critical fact" until February 1979, namely that respondent was acting in the scope of his federal employment. Petitioner does not contend that he was unaware that respondent, a life-long neighbor, was a federal employee who drove to the various county offices he supervised or that the accident occurred during a weekday afternoon. His argument is essentially that he did not know that such use of respondent's personal automobile could be considered action within the scope of federal employment: this is a legal question of precisely the sort that is to be analyzed and resolved by a plaintiff *within* the limitations period.

ground that the government had, after the filing of the suit, "lull[ed] plaintiffs into a false sense of security by waiting until plaintiffs' time to file an administrative claim had expired and thereupon move to be substituted and to dismiss." 568 F. 2d at 262. The Second Circuit affirmed on the grounds that the administrative claim requirement in the Federal Tort Claims Act does not apply to suits governed by the Federal Drivers Act. As to those, the court reasoned, the state court suit against the federal employee, who should inform his federal employer, functions as an equivalent form of notice. *Id.* at 264-266. The Second Circuit also stated that the removed case should simply be considered a continuation of a properly filed state court case, subject only to the condition that it be remanded if it is determined that the accident did not occur within the scope of federal employment. *Id.* at 268.

As noted above, the plaintiffs' suit in *Kelley* was commenced *within* the two-year period for the filing of claims under the Federal Tort Claims Act. Accordingly, the Second Circuit did not decide the issue resolved by the court below—whether a state court suit commenced against a federal employee within the state limitations period but *more than* two years after the claim accrued would be time-barred under 28 U.S.C. 2401(b). 568 F. 2d at 268.

In our view, *Kelley* was wrongly decided because the filing of an administrative claim within the two-year federal limitations period is a prerequisite for all tort suits against the United States, including suits originally brought against federal drivers in state court. We thus believe that the correct rule was stated in *Meeker* v. *United States*, 435 F. 2d 1219 (8th Cir. 1970). But this is not an appropriate case in which to resolve the conflict between those cases because petitioner, unlike the plaintiffs in *Kelley*, filed even his state court suit outside the period for filing an administrative

claim with the appropriate federal agency. Hence, petitioner's state court suit was inadequate as a substitute for compliance with the administrative claim requirement. Since the Second Circuit did not decide whether a federal claim would be barred in such circumstances, there is no conflict to resolve in this case.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT S. GREENSPAN
CARLENE V. MCINTYRE
Attorneys

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[5]There is no merit to petitioner's contention (Pet. 22), in reliance on Judge Lay's dissent from the denial of the petition for rehearing en banc (Pet. App. 79-80), that the limitations provision of the Federal Tort Claims Act should be deemed waived by the United States Attorney's act of substituting the United States for respondent after the limitations period had expired. The limitations period is a condition on the liability of the United States that must be strictly observed. *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). It cannot be waived by the action of the United States Attorney. See *Munro* v. *United States*, 303 U.S. 36, 41 (1938).

Moreover, by choosing to intervene, the United States Attorney cannot be said "to take the original suit as [he] finds it" (Pet. App. 79). The United States Attorney is under a statutory duty to substitute the United States for a federal driver. See 28 U.S.C. 2679(d). Because petitioner did not bring suit in state court until more than two years had elapsed after the accident, there can be no claim in this case that the motion to substitute was delayed for tactical reasons.

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